

The state court denied the petition for post-conviction relief, finding that "[t]he conduct of previous counsel for the Defendant and counsel for the State did not prejudice the Defendant." (Ex. X: M.E. 1/30/85.)

The Babbitt, Gerhardt, Douglass, Foreman and Derickson affidavits have been submitted by Petitioner in support of his present habeas claim that Regina had a conflict of interest and provided ineffective assistance during the hearing at which Petitioner withdrew from the plea agreement. (File doc. 107 at 14-23.) Babbitt and Gerhardt were Regina's colleagues at the Maricopa County Public Defender's Office. (Ex. AAAA, BBBB.) Douglass was the Chief Assistant Public Defender. (Ex. EEEE.) Derickson was the judge who presided over the plea agreement hearing. (Ex. CCCC.) Foremen is apparently an expert on the standard of care for attorneys representing persons charged with capital offenses. (Ex. HHHH.) None of these affidavits were presented in state court.<sup>4</sup>

Petitioner argues that Keeney does not prevent this Court from expanding the record and considering the affidavits because he is relying on the first, second, third and sixth circumstances of

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3. (...continued)

would produce at trial. (Ex. G: R.T. 11/18/81 at 15-17i.) After he signed the plea agreement, Petitioner filed a pro per motion to withdraw from the agreement and told the judge that he entered into the agreement only because Regina pressured him to do so against his wishes. Judge Derickson informed the parties that he did not intend to accept the concurrent sentences provided for in the plea agreement anyway. (Ex. H: R.T. 12/15/81.) Regina tried, unsuccessfully, to get a different judge assigned to the case. (Ex. W: R.T. 1/28/85 at 114-15; Ex. X: M.E. 12/18/81.) At the next hearing, the judge told Petitioner that he would accept a plea agreement whereby the sentences for second degree murder and aggravated assault would run consecutively. Petitioner declined and opted to go to trial. (Ex. I: R.T. 12/22/81.) Shortly thereafter, Klink replaced Regina as Petitioner's counsel. (Ex. W: R.T. 1/28/85 at 121-23, 133-35.)

4. Petitioner filed four petitions for post-conviction relief in state court: 10/12/84 (DEx. Y, vol. 2: R.O.A. 115); 1/20/87 (Ex. II.); 5/11/88 (Ex. RR.); and 7/17/91 (Ex. BBB.).

Townsend, not on the fifth (to which Keeney's cause-and-prejudice rule applies). (File doc. 115.) Even so, the Court finds that the first-second, third and sixth Townsend circumstances do not exist in the present case. Petitioner argues that they are present because the state court applied the wrong legal standard to the facts and decided whether there was "prejudice," instead of whether "an actual conflict of interest adversely affected [counsel's] performance." However, it was Petitioner who argued to the state court that it should find prejudice. (There was no issue raised regarding whether a different legal standard should be applied.) (Ex. Y, vol. 2: R.O.A. 115 at 3-8; R.O.A. 124.)<sup>5</sup> Furthermore, the Court has reviewed the state court record and finds that the state court conducted a full and fair fact hearing into the circumstances and consequences of Regina's alleged conflict of interest. That is all which was required. Petitioner could have presented the affidavits or testimony of Babbitt, Gerhardt, Douglass, Foreman and/or Derickson at the hearing, regardless of which legal standard ultimately was to be applied by the state court in ruling on Petitioner's claim.<sup>6</sup> The Court will not expand the record and consider these affidavits which the state court never had the opportunity to review.

### Shafer, Meyer and Kvetko Affidavits

The post-conviction relief hearing held on January 28, 29 and 30, 1985, in state court also addressed Petitioner's claim that his trial counsel (Klink) provided ineffective assistance at sentencing because he presented only one psychiatric report and no mitigation witnesses or other exhibits. (Ex. W; Ex. Y, vol. 2: R.O.A. 115 at 8-12.) Klink, Regina, appellate counsel, and several psychiatrists were called to testify regarding the facts of this claim. (Ex. W.) The state court

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5. At this time, it is not necessary for this Court to decide whether the state court applied the correct legal standard.

6. The facts provided by the affidavits would have been relevant to the subject of the fact hearing, no matter whether the "prejudice" or "adverse affect" standard would be applied.

found that trial counsel's assistance was not ineffective and that Petitioner had failed to show a reasonable probability of a different result. (Ex. X: M.E. 1/30/85.)

The affidavits of Richard E. Shafer, Mary Margaret Meyer, and Valerie Kvetko are now submitted by Petitioner in support of his habeas claim that trial counsel was ineffective in failing to discover and offer at sentencing readily available mitigation evidence. (File doc. 115 at 2-3; file doc. 107 at 23-31.) Shafer is one of Petitioner's investigators who states that trial counsel's pre-trial investigation was far below the minimum required for a competent investigation in a capital case. (Ex. DDDD.) Meyer, another of Petitioner's investigators, provides a summary of the background information on Petitioner which she found. (Ex. FFFF.) Kvetko, Petitioner's sister, relates her knowledge of Petitioner's life history. (Ex. GGGG.) None of these affidavits were presented to the state court.

Petitioner does not argue cause and prejudice to excuse the failure to present the affidavits in state court. Rather, Petitioner relies on Sawyer v. Whitley, 505 U.S. 333, 112 S. Ct. 2514 (1992) and argues that a "fundamental miscarriage of justice" would result if the affidavits were not considered by the Court because he is "actually innocent" of the death penalty. (File doc. 115 at 8-9.) Pursuant to Sawyer, Petitioner must show by clear and convincing evidence that, but for a constitutional error, no reasonable sentencer would have found the existence of any aggravating circumstance or some other condition of eligibility for the death sentence under the applicable state law. Id. at 336, 345, 112 S.Ct. at 2517, 2522. However, Petitioner has failed to mention that Sawyer further holds that claims regarding errors in the submission mitigation evidence do not relate to a "condition of eligibility" and cannot form a basis for relief under the actual innocence exception. Id. at 345-47, 112 S. Ct. at 2522-23. Because his claim is based on an alleged error in the submission of mitigation evidence, Petitioner cannot establish actual innocence of the death penalty or a fundamental miscarriage of justice.

The Court finds that the state court afforded Petitioner a full and fair fact hearing on his ineffective-assistance-of-counsel claim. Post-conviction counsel was not limited as to the evidence he could present at the hearing. The Court will not expand the record and consider the Shafer, Meyer and Kvetko affidavits which the state court never had the opportunity to review.

Accordingly,

IT IS ORDERED granting Respondents' Motion to Strike Petitioner's Exhibits AAAA Through HHHH [file doc. no. 112].

DATED this 17 day of July, 1996.

s/ \_\_\_\_\_  
Roslyn O. Silver  
United States District Judge

Copies to all counsel of record.